






C. Participants and their Rights, Preliminary Proceedings

1. Persons Participating in the Case and their Rights

In defining the rights and obligations of those appearing before the court during the consideration of a case, the legislation applicable to the arbitrazh courts divides participants into two groups — “participants in the case” and other “participants in the proceedings.” Participants in the case are the parties who are directly interested in its outcome and who have substantive positions on the legal and factual issues in the case. They include the parties (plaintiff(s) and respondent(s)), any third parties, and may also include the procurator and a federal, regional, or local body if the procurator or body files a petition for the protection of state or public interests. The rights of all of these “participants in the case” are defined generally by Article 33 of the APC and include the right:

-  to acquaint themselves with the materials of the case and to take notes on them and make photocopies of them;
-  to petition for the recusal of judges or other participants (experts, interpreters);
-  to pose questions during the consideration of the case, and to make motions and petitions, and also to object to the motions and petitions of other participants;
-  to give explanations to the arbitrazh court, and to present opinions and arguments on all questions arising during the consideration of the case, and to object to the arguments of other participants; and
-  to appeal acts of the court and to exercise other procedural rights.

The plaintiff and respondent in the case, of course, have particular rights in the case which follow from their roles. The plaintiff has the right, prior to the issuance of a decision, to withdraw the suit, or to make changes in the subject of the suit or change the demands made of the respondent. The respondent has the right to admit the plaintiff's claims, in part or in full. The direct parties to the suit have the right to conclude a settlement agreement at any stage of the proceedings.¹⁴ The arbitrazh court, however, may not accept a withdrawal of the suit, change in the bases or demands of the suit, admission of claims or a settlement agreement if the action violates a law or regulatory act or infringes upon the rights and legal interests of other persons.

Third parties may be participants in a case if they have an independent claim directly concerning the subject of the dispute, or if the outcome of consideration of the dispute affects their rights or obligations in relation to one of the parties. Where a third party has an independent claim, the third party enters the case through the filing of a petition, which must correspond to the general requirements for any petition of suit. A petition concerning entry into a case that has already begun may be rejected or returned to the third party on the same grounds that an original petition of suit may be return to the

¹⁴ Article 121 of the APC. See the section on settlement agreements later in this Chapter.

plaintiff, except that such third parties are not required to abide by the rules concerning direct attempts to settle certain kinds of disputes. A third party with an independent claim has the general rights of a participant in the case, and has all of the rights of a plaintiff concerning its own claim (e.g. amendment, withdrawal, and settlement).

A third party that does not have an independent claim, but whose rights and obligations will be affected by the outcome of the case, may enter the case on the side of the plaintiff or of the respondent at any time prior to the issuance of a decision in the case. Third parties of this kind may also be summoned to participate in the case on the basis of a motion of one of the parties or on the initiative of the court itself. Such third parties may be related to a participant in the suit (e.g. the founder of a legal person), or may be unrelated parties whose own rights and liabilities are affected by the outcome (e.g. an insurance company or other party that may be liable to compensate the respondent if it must pay the plaintiff). It is quite important to note, however, that while a third party may participate in a case due to its possible liability to the respondent in the event of a judgment against the respondent, the arbitrazh court does not have the right to combine the claim of the respondent against the third party for compensation with the original claim against the respondent and consider them together. If the respondent wishes to receive compensation from the third party for a judgment paid to the plaintiff, a separate claim must be filed in the arbitrazh court on this subject. Third parties without an independent claim have the general procedural rights of a participant in the case, except those which concern changes in the sum demanded or the legal basis of the underlying suit. A third party also lacks the right to compel execution of the judgment on the original suit.

2. Additions and Changes of Parties to a Case

Changes and additions to the parties in the case may be made by the court in several instances. Additional respondents may be added by the arbitrazh court, at the request of or with the consent of the plaintiff, at any time prior to the issuance of a decision on the case. Where it is established that the suit was filed by an improper party (not possessing the right of claim in the case), or addressed to an improper respondent (e.g. to a subdivision having no legal personality), the court may, with the consent of the plaintiff, permit the replacement of the plaintiff or respondent with the proper party. If the plaintiff does not agree to replacement by the proper plaintiff, that party may enter the case with the status of a third party with independent claims, and the court must inform that party of this possibility. If the plaintiff does not consent to the replacement of a respondent with another party, the court may summon the proper respondent as an additional respondent. Such addition of a respondent, however, also requires the consent of the plaintiff. The law provides that the consideration of the case must be begun again from the very beginning after the replacement of an improper party with the proper party.¹⁵ This requirement is not stated in the law for cases in which an additional respondent is added, so long as the original respondent remains in the case and was a proper party.

¹⁵ Article 36 of the APC, part 4.

3. Participation of the Procurator and of State Bodies

The procurator and also federal, regional and local bodies have rights both to file suit in the arbitrazh courts independently, and to participate in an already existing suit for the purpose of protecting state or public interests. Current legislation on the participation of these bodies, however, does not clearly distinguish the two forms of participation and the rights of the relevant bodies in each case. One commentary to the APC, published shortly after its passage, suggested that both an independent filing of suit and participation in an existing case would require a specific basis in law, such as a provision that the relevant body has the right to file suits in arbitrazh courts concerning particular types of legal violations, or a provision giving the body a general right to participate in cases concerning its area of responsibility.¹⁶ On the other hand, a recent ruling of the Higher Arbitrazh Court held that the list of grounds on which the procurator may file suit to protect state or social interests that is contained in the law is not exhaustive, and the procurator may appear also in other types of cases to represent the interests of the state.

According to the APC, the procurator and state bodies, when participating in a case, have all of the rights and obligations of a plaintiff, except the right to conclude a settlement agreement. A withdrawal of the suit or claim of the procurator or state body, however, does not deprive an original plaintiff in the case or a plaintiff in whose interests the case was filed by the procurator or state body, of the right to demand that the case be considered on its merits. If the procurator or state body has filed suit on behalf of a particular plaintiff, however, and that plaintiff withdraws the claim, the case is to be left without consideration. Although previous legislation provided state bodies with the ability to participate in a case by means of the submission to the court of a conclusion on the case, currently effective legislation no longer provides for this general right.

4. Witnesses, Experts and Interpreters

Witnesses, experts and interpreters are not considered persons participating in the case, but rather other “participants in the arbitrazh process.” Their rights and duties are defined separately in the articles of the APC devoted to each of these categories of participants. Witnesses are obligated to appear when called, to give true testimony, and to answer the questions asked by the judge(s) and persons participating in the case.

Experts in a case before an arbitrazh court are appointed to give an opinion in the case by the court, at its own initiative or at the request of participants. The participants may propose questions that are to be asked of the expert, but it is the court’s responsibility to determine the final formulation of the questions on which the expert will give an opinion or conclusion. If the court rejects the proposals of the participants in the case, it must set forth the reasons for doing so in its determination on the appointment of the expert. Experts appearing in the case are obligated to appear when called and to

¹⁶ For example, Article 12 of the Law of the Russian Federation “On Competition and the Limitation of Monopolistic Activity on Goods Markets” gives the antimonopoly body the right to participate in cases concerning the violation of antimonopoly legislation.

present their conclusions, but may refuse to give conclusions if they have not been provided with adequate information or the conclusion requested is beyond their expertise. An expert has the right to acquaint himself with the materials of the case, and to participate in the sessions of the court, ask questions and request additional materials if these things are necessary for the issuance of a conclusion.

Interpreters are required for the conduct of cases in arbitrazh courts to assist those who do not have a command of the Russian language (see below regarding language issues). The interpreter is appointed by the court, and may be chosen from among persons proposed by the participants. A participant in the case may not, however, serve as an interpreter. An interpreter is required to appear when called, and to completely, correctly, and timely interpret/translate. The interpreter may ask those present questions during the proceedings, if necessary for an accurate translation.

Both interpreters and experts are subject to recusal on the grounds of relationship to participants or their representatives, direct or indirect interest in the case, or other grounds casting doubt on their objectivity. An expert may also be recused on the grounds of current or prior subordinate relationship to a participant in the case or their representative, or the production by the expert of materials or opinions which served as the basis for the suit or which are being used in the consideration of the case. Unlike a judge, however, prior participation in the case is not grounds for recusal of an expert or interpreter. Experts and interpreters are expected to recuse themselves if grounds exist, but participants may also petition for their recusal. Witnesses are not subject to recusal, and there are no rules in the general procedural law applicable to the arbitrazh courts which disqualify witnesses under certain circumstances (e.g. a legal representative asked to testify to facts known due to service in that capacity), although the rules of other legislation protecting certain knowledge may be applied to limit witness testimony or appearance in those cases.

Witnesses, experts and interpreters are subject to fines and, in some circumstances, criminal penalties for the knowing presentation of false information, conclusions or translations.¹⁷ Each of these participants is warned concerning the possibility of criminal liability when appointed and/or before giving testimony. With respect to witnesses, there are no provisions for the submission of written statements of witnesses who cannot be present in a court session.

¹⁷ Articles 307, 308 and 309 of the Criminal Code of the Russian Federation apply to these issues. Article 307 concerns the giving of a knowingly false expert conclusion, testimony or incorrect translation and provides for penalties ranging from a fine of from 100 to 200 times the minimum monthly wage to arrest for up to 3 months if committed in a case not concerning a grave crime. Article 308 concerns refusal of a witness or victim to provide evidence, and envisions penalties ranging from a fine of 50 to 100 times the minimum wage to arrest for a period of up to three months. Although the language of Article 308 does not specify that it is to apply only to criminal cases, the reference to victims suggests that this may be the intent. Article 309 concerns the use of payment or threat to induce a witness, interpreter or expert to give false testimony, conclusions or translations, with penalties ranging from a fine of 100 to 200 times the minimum wage to arrest of up to three months where payment is involved, and from a fine of 200 to 500 times the minimum wage to imprisonment of up to seven years where varying degrees of force and organization are involved.

5. Representatives

Organizations or other legal entities participating in a case before an arbitrazh court may be represented in the court by their heads or by other persons authorized by the founding documents of the organization to represent it. In appearing in the court, these persons must present to the court documents confirming their position in the organization and their authority to represent it. Both organizations and individuals may also choose to have a representative (not part of the organization's staff or not the individual himself) conduct their case in the court. A person who is considered the legal representative of another individual — parents, guardians of persons without legal capacity — may represent that person or may choose to appoint another representative. The presence of a representative does not deprive an individual of the right to take part in the case.











A representative may be any person who has been given the authority to conduct the case, and who has a properly formalized proof of that authority. Exceptions to this rule are judges, investigators, procurators and those who work for the court, who may only appear as representatives of the corresponding court or procuracy or as legal representatives (such as a parent for a child). It is important to note that a representative may only be a physical person. A legal entity may not be empowered as a representative, and an authorization that purports to give a firm (such as a law firm) or other legal entity the powers of a representative has been rejected by some courts. With respect to a legal firm, the authorization may be given to one or more of the specific attorneys, with specific authorization for those representatives to authorize another member of the firm, if that is desired.

The authority of a representative must be formalized by a written authorization, verified in accordance with legal requirements. For an authorization to represent an organization, the written authorization requires the signature of the head of the organization or another person authorized by the founding documents of the organization, and must have the seal of the organization. For representation of an individual, the authorization must be certified by a notary or by another authorized official. There is no legally established form for the authorization given to an advocate (lawyer), but these are usually simple written statements authorizing the relevant person to conduct the case.

A general authorization to conduct the case gives the representative the right to take many, although not all, of the procedural actions which the represented party could take themselves. Without a proper authorization, representatives will not be permitted to participate in the proceedings at all, nor to acquaint themselves with the materials of the case. Rejection of authorizations for representatives due to inappropriate signatures or other defects in form are reported to be relatively common, and it is advisable to take some care that the formalities are observed and that the representative is provided with evidence of the authority of the signatory. This evidence (such as an excerpt from the company charter or other statement of authority) may itself need to be authenticated by a notary or other authorized official.

There are a number of key procedural actions which may be taken by a representative only if the authorization given specifically expresses the intent to allow that action. Without the proper written authorization to take these specific actions, the representative can conduct the other aspects of the client's case, but will have to obtain the client's signature, presence, or participation (or an amended power of attorney) to complete each of the actions.¹⁸

If you want to authorize your representative to:

-  sign a petition of suit on your behalf;
-  transfer the dispute to an arbitration tribunal;
-  fully or partially withdraw the suit or admit any of the claims in a suit;
-  change the subject or grounds for a suit;
-  conclude a settlement agreement;
-  appeal a court determination or decision;
-  sign a petition for a supervisory protest;
-  make a demand for mandatory enforcement of the decision;
-  authorize another person to conduct the case on your behalf;
-  receive property or money from the judgment for you;

you *must* specifically write the task into the authorization to represent you
(power of attorney)

6. Language Issues and Interpretation

The language of all arbitrazh court proceedings in the Russian Federation is Russian. Persons participating in a case who do not have command of the Russian language have the right to use an interpreter to acquaint themselves with the materials of the case and to participate in the court's proceedings and the court session. An interpreter is provided by the arbitrazh court to such persons and is paid by the arbitrazh court for his/her services. The interpreter may be appointed from among persons proposed by the participants, but may not be a participant in the case. Violation of the rights of persons participating in the case to have interpretation is grounds for an unconditional reversal of decisions of arbitrazh courts of the first instance or decrees of the appellate instance.

¹⁸ The rules concerning special authorization for procedural actions are one of the areas in which the procedural rules for the arbitrazh courts and for the courts of general jurisdiction diverge significantly. A representative in the court of general jurisdiction may perform many procedural actions on the basis of a general authorization which cannot be performed in the arbitrazh courts without specific authorization.

7. Challenge to the Composition of the Court (Recusal of Judges)

Cases in the arbitrazh courts are, as a rule, considered by a single judge in the first instance, with the exception of cases concerning validity of acts of state bodies and cases concerning insolvency, which must be heard collegially (by a panel or three or another odd number of judges). There are a number of grounds which may prevent a particular judge from participating in a given case:

Circumstances that Prevent an Arbitrazh Court Judge From Participating in a Case

- 👉 S/he is related to any of the persons participating in the case (including the primary parties and also other participants, such as the procurator and third parties) or to their representatives.
- 👉 S/he will or has previously participated in the same case as expert, witness, interpreter, procurator or representative.
- 👉 S/he participated in considering the case while serving on a court of another instance.
- 👉 S/he participated in the consideration of the case previously, and the case has now been returned to the court for reconsideration in accordance with the ruling of a higher court. (This does not apply to a case being reopened and reconsidered on the grounds of newly discovered circumstances.)
- 👉 S/he has a direct or indirect personal interest.
- 👉 There are other grounds cast doubt on the judge's impartiality.
- 👉 S/he and another judge on the panel are related.

Where any of these grounds exist, a judge is required by law to recuse himself/herself from consideration of the case. A participant in the case may also make a petition to have one or more of the judges assigned to consider the case recused on any of the grounds listed. Such a petition must contain the full justification for the request and must be submitted immediately, prior to the beginning of consideration of the case on its merits. After the case has begun to be considered, petitions for recusal (and also self-recusal) will be permitted only where the circumstances serving as the basis for the recusal became known after the consideration of the case commenced.

When a recusal petition is made, the arbitrazh court is required to hear the opinions of the petitioner and the other participants in the case, as well as of the judge whose recusal was requested. The decision on recusal will be made either by the chair of the arbitrazh court, the chair of the judicial collegium to which the judge belongs, or by the entire composition of the court, depending upon the stage of proceedings and number of judges challenged. A successful petition for recusal results in the consideration of the

case in the same arbitrazh court, but by a different judge or panel. If the recusal of a number of judges leaves the arbitrazh court unable to consider the case, the case must be transferred to an arbitrazh court of the same level for consideration. A sample of a petition for the recusal of a judge, as well as the determination issued in response to that petition, appear as Appendix E to the Handbook.

8. Measures for Securing the Suit

A number of measures for securing the suit — that is, for ensuring that funds or property are available to meet a possible judgment — are available in the arbitrazh courts, including:

- arrest of property or funds belonging to the respondent;
- prohibition on particular actions by the respondent (e.g. sale of property);
- prohibition on actions of other persons concerning the subject of the dispute;
- suspension of execution on an execution order or other document authorizing the direct receipt of the sum from the plaintiff (plaintiff's accounts); and/or
- suspension of the sale of property if the suit concerns a petition to release property from arrest.

The listed measures, or a combination of such measures if necessary, can be taken only upon a petition by a person participating in the case. (A sample of such a petition, requesting arrest of property, and of a determination issued on the petition, appear in Appendix F to the Handbook.) The list of measures is exhaustive, and the court may not impose other measures of its own devising. ***The arbitrazh court does not have authority to take measures to secure the suit on its own initiative.*** Once a petition has been made, the court is obligated to consider it no later than the following day after it is received, and to issue a determination on the matter. The determination of the court may be appealed, but the appeal does not suspend execution of the measures imposed by the court in its determination. ***The execution of the measures imposed by the court is not immediate or automatic, but rather takes place on the basis of an execution order issued by the court in the same procedure as that for execution orders concerning final decisions.***¹⁹

The respondent in a case has the right to petition for measures to be imposed to secure counter-claims. A respondent (either to the original claim or to the counter-claim) may also request that the court, having imposed measures to secure the suit, require the plaintiff to provide security that any damages to the respondent resulting from the measures of security will be compensated. Failure of the respondent or other persons to observe prohibitions imposed as measures of security may result in substantial fines,²⁰

¹⁹ See Chapter 5 for a discussion of execution proceedings.

²⁰ The fine may be up to 50 percent of the value of the suit. For suits not subject to valuation, the fine is less significant — up to 200 times the minimum monthly wage. It should be noted, however, that many of the types of suit not subject to valuation concern such matters as challenge to the validity of the act of a state body, where security for the suit is not at issue.

and the plaintiff has the right to seek damages caused by failure to abide by measures of security.²¹

The arbitrazh court is not obligated to impose any measure of security, and the party seeking these measures must provide evidence and argument to the court which confirm that in the absence of these measures, the execution of a decision may be hindered or become impossible. Participants arguing for such measures, however, must take into account the possibility that they will become liable for damages caused to the other party by the measures of security if the case is not decided in favor of those who sought the measures. A respondent (on the original claim or to a counter-claim) has a general right to seek from the plaintiff the reimbursement of damages caused by the imposition of security measures for any portion of the suit in which the plaintiff was not successful. This right applies also in cases when the proceedings in the case are terminated or the case is left without consideration.²²

If the court chooses to impose security measures, the funds or property involved are not reserved by this action only for the satisfaction of the plaintiff's claims. For example, if a judgment in the plaintiff's favor is issued, that judgment might not be the first claim to be paid from the respondent's accounts in terms of legally determined creditor priority. If there are creditors with a higher priority and there are not sufficient funds, the judgment for the plaintiff might not be paid or might not be paid in full, even if arrest was imposed on funds in the respondent's account as a measure of security for the plaintiff's suit. During the consideration of the case, if there exist creditors whose claims have a legal priority higher than that of the plaintiff, and if there are no funds in the respondent's account other than those which have been arrested to secure the plaintiff's suit, the creditors may petition the arbitrazh court to permit the sum due to them to be deducted from the account. It should also be noted with respect to bank accounts that arrest may be imposed only on sums of money that are in the accounts at the time of imposition of the measures to secure the suit. The court may not impose arrest on the accounts themselves nor on funds which are received into the accounts in the future.

Measures of security may be changed through the same petition procedure as that for imposition of the measures. In a case concerning the exaction of money, a respondent may, rather than executing the measures established for securing the suit, choose to place the sum in dispute in the deposit account of the arbitrazh court.

²¹ Damages must be sought through the filing of another suit in the same arbitrazh court. Since the fact that the plaintiff was damaged by the failure may not be completely clear until the original case has been decided (since the plaintiff must win the case, at least in part, for it to need access to the security), such a suit could not be filed until after a decision has been entered in the original case. The plaintiff can, however, seek mandatory execution of the security determination through the issuance by the court of an execution order.

²² In order for damages to be recovered, the respondent must file suit in the same arbitrazh court in which the original case was decided. This is an exception from the general rules on venue, since that court is not necessarily in the location of the respondent in the case concerning the damages (the original plaintiff).

9. Preparation of the Case

The transformation of the state arbitrazh system from an administrative dispute resolution system into a system of courts, and the general movement of the Russian legal system toward a greater use of adversarial models, have both involved reductions in the amount of investigative and preparatory work expected of judges in resolving economic disputes. Nonetheless, the arbitrazh court may still take an active role in the preparation of the case for consideration in court. The judge is responsible for taking a long list of actions (if necessary) prior to the hearing.

The list of actions to be taken by the court is not considered exhaustive, and other measures may also be taken if necessary. Each of the listed actions, and also any other actions taken by the judge in preparing for the hearing of the case, must be taken in accordance with the APC and other legal rules governing those actions. Some of the issues listed as within the judge's responsibility in preparing the case are not matters that the court can resolve on its own initiative. This does not prevent the judge from addressing these matters, however, as the judge may propose to the participants in the case that the relevant action be taken, or offer them the opportunity to take it. For example, the court does not have the power to include third parties in the case in those instances when the third parties have independent claims. However, if the materials submitted in the case suggest that such third parties exist, and that their presence would contribute to the more efficient and correct resolution of the case, the judge may inform them of the proceedings and of their right to participate in them.

Preparation of the Case

Judge's "To Do" List

- ☒ consider questions of summoning additional/different respondents and/or third parties to participate in the case
- ☒ inform interested persons concerning the proceedings in the case
- ☒ propose that the participants in the case or other persons and entities that documents and information significant in the case be provided
- ☒ verify the relevance and admissibility of evidence already submitted
- ☒ summon witnesses
- ☒ consider the possibility of appointment of an expert
- ☒ send mandates to other arbitrazh courts (to undertake procedural actions relevant to the case)
- ☒ summon the persons participating in the case
- ☒ take measures toward the conciliation of the parties
- ☒ resolve questions of the necessity of summoning the heads of the organizations participating in the case to give explanations
- ☒ take measures for securing the suit

In addition to such formal actions as summoning third parties, the court may suggest that participants take other actions it considers necessary, such as clarification of unclear demands or objections, submission of additional information concerning the circumstances of the case or the governing law, provision of copies of additional documents necessary in the case, and others. These suggestions may be included in the determination accepting the suit for consideration and setting the date for its consideration in court. The sample of such a determination which appears in Appendix B is a form document, containing sections in which the judge accepting the case may fill in the necessary proposals in regard to documents and evidence.

The judge must also, according to Article 112, point 9 of the APC, facilitate the conciliation of the parties. Recent commentary on the application of this provision, however, suggests that the judge's responsibility is limited to explaining to the parties at the preparatory stage, and again when the court hearing of the case begins, their right to conclude a settlement agreement, and perhaps to inquiring at the preparatory stage concerning whether the dispute might be settled in this manner. The judge must issue a determination on the preparation of the case for hearing, which contains a statement of the actions that must be performed prior to the hearing and the time and place that the hearing will be conducted, and this determination must be sent to all of the persons participating in the case.